No. 80-441

In the Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL., PETITIONERS

v.

WESLEY P. BERNARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the district court, in an uncertified class action alleging systematic employment discrimination based on race, can impose blanket restrictions on communications by the named plaintiffs and their attorneys with potential class members, absent a showing of actual or threatened misconduct.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Attorney General and the Equal Employment Opportunity Commission have enforcement responsibility for Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits, *inter alia*, racial discrimination in employment. The Attorney General also has enforcement responsibility for a variety of other federal civil rights laws, including those requiring nondiscrimination in voting (42 U.S.C. 1971 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c *et seq.*), federally assisted programs (42 U.S.C. 2000d *et seq.*), and housing (42 U.S.C. 3601 *et seq.*). Because the executive branch has limited resources, private court actions are an essential means of effectuating the national policy embodied in these statutes and in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Under Title VII in particular, employees who, with the assistance of private or "public interest" counsel, prosecute class actions to eradicate unlawful employment discrimination are advancing a national policy of "the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). This Court has recognized the role played by the legal staffs of non-profit civil rights organizations in achieving this end. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

The United States has an additional interest in this case because it involves the right of individual Title VII claimants to reject the terms of a settlement negotiated between their employer and the federal government and to pursue instead a private right of action in federal court. While the United States recognizes the strong federal policy favoring voluntary settlement of employment

discrimination claims, it also has an interest in ensuring that the beneficiaries of government-negotiated settlements are not deprived of an opportunity to make an informed choice between accepting the benefits of settlement and privately litigating their claims.

STATEMENT

1. This class action was filed on May 18, 1976, by six present and former employees (respondents herein) of Gulf Oil Company, who seek to represent a class composed of all present and past black employees and all unsuccessful black applicants at Gulf's plant in Port Arthur, Texas. The complaint alleges that Gulf Oil engaged in systematic and continuing employment discrimination against blacks in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981, and requests extensive declaratory, injunctive and monetary relief (J.A. 11-20).[1] Plaintiffs are represented by staff attorneys of the NAACP Legal Defense Fund and local counsel in association with the Legal Defense Fund (J.A. 81, 111-120).

At issue in this case is an order entered by the district court shortly after the complaint was filed and prior to certification of the proposed class, prohibiting the plaintiffs and their attorneys from communicating with prospective class members without prior approval from the court (J.A. 124-127). This restriction on communications was entered without findings of facts and with no showing of actual or threatened misconduct by plaintiffs or their attorneys (see J.A. 46-79, 92-104, 124-127).

Six and one-half months later, the district court granted summary judgment to the defendants (petitioners in this Court) on the ground that the plaintiffs' claims were barred by the statute of limitations and the doctrine of laches (J.A. 170). On appeal, a three-judge panel reversed the latter rulings and, with one judge dissenting, upheld the order restricting communications

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[1] "J.A." refers to the Joint Appendix filed with petitioners' brief.

with potential class members as a permissible and constitutional exercise of the district court's authority to control class actions under Fed. R. Civ. P. 23(d). On rehearing en banc, the court of appeals adopted the panel's opinion on the statute of limitations and laches issues and, by a vote of twenty-one to one, invalidated the "gag" order (J.A. 277). Thirteen of the judges held that the order placed an unconstitutional prior restraint on speech and, in so doing, violated Rule 23 as well (J.A. 231-268). Eight judges declined to reach the constitutional question (J.A. 275, 276), concluding that the order violated Rule 23 because it was issued in the absence of "'a factual showing * * * that unsupervised communications between counsel and named plaintiffs on the one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened'" (J.A. 273).

2. On April 14, 1976, more than one month before this suit was filed, Gulf Oil Co., the EEOC and the United States Department of the Interior entered into a conciliation agreement in settlement of a Commissioner's charge[2] alleging widespread racial discrimination by Gulf against black employees at its Port Arthur plant (J.A. 26-39). Under the agreement, Gulf undertook to cease allegedly discriminatory practices, to establish an affirmative action program with hiring and promotion goals, and to offer back pay to alleged victims of past discrimination, ranging from $2.81 to $5.62 for each month of service (J.A. 26-42). Each person identified as an "affected class member" under the agreement was to receive a letter, signed jointly by Gulf and the EEOC, explaining the back pay offer and instructing those who wished to accept it to sign a waiver within 30 days of receipt releasing Gulf from "any and all claims against [it] as a

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[2] Under Title VII, a Commissioner of the EEOC may file a charge of employment discrimination against an employer without joining individual employees. 42 U.S.C. 2000e-5(b). The EEOC is then authorized to investigate the Commissioner's charge and to attempt to conciliate it with the employer prior to filing suit. 42 U.S.C. 2000e-5(b), 2000e-5(f).

result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future affects of past or present employment practices" (J.A. 31). Gulf agreed to mail each employee a back pay check upon receiving the signed release (*ibid.*).

Pursuant to the conciliation agreement, on May 1, 1976, Gulf sent letters offering back pay and soliciting releases to 614 present and former black employees and 29 female employees at the Port Arthur plant (J.A. 22-23, 128). A sample letter is attached to this brief as an Appendix.[3] The letter did not mention the affirmative action goals or any of the provisions of the conciliation agreement other than the back pay offer. Although it stated that the amount of the offer "was figured according to your plant seniority date," the letter did not otherwise explain the basis for the offer or how the award was computed. "Because this offer is personal in nature," Gulf urged the offerees "not [to] discuss it with others," and promised that "Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants" (Appendix, *infra*).

The class action complaint in this case was filed approximately three weeks later, on May 18, 1976 (J.A. 11). On May 27, 1976, before answering the complaint and before a class was certified, Gulf filed a motion for an order prohibiting communications between the parties or their counsel and actual or potential class members (J.A. 21). In that motion, Gulf asserted that it had received reports that plaintiffs' attorneys met on May 22 in Port Arthur with their clients and potential class members and that during the course of the meeting a Legal Defense Fund attorney advised the employees not to accept Gulf's back pay offer under the conciliation agreement

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[3] Although this letter was not formally made a part of the record on appeal, its substance was before both the district court (see J.A. 128) and the court of appeals (Brief of United States as *Amicus Curiae* on Rehearing En Banc, Exhibit 1).

because they could recover twice as much in the suit just filed (J.A. 23-24). Gulf further represented to the court that as of that moment, approximately 452 of the 643 employees eligible for back pay had accepted the offer and executed general releases (J.A. 23).

Despite plaintiffs attorneys' denial of Gulf's unsworn allegations, a temporary restraining order was entered the following day prohibiting, without exception, all communications concerning the case by parties or their counsel with potential class members (J.A. 44). The order was not accompanied, or followed, by findings of fact or conclusions of law (J.A. 44-45).

Eleven days later, Gulf filed a request to modify the temporary restraining order so that it could resume making back pay offers pursuant to the conciliation agreement (J.A. 46). In an accompanying brief, Gulf asserted that the same Legal Defense Fund attorney whose alleged conduct it earlier had assailed also recommended at the May 22 meeting that employees who had already signed releases return their back pay checks to Gulf (J.A. 47). In further support of the request, Gulf filed an affidavit signed by an EEOC employee stating that the issues raised in the lawsuit were "almost identical" to those resolved by the conciliation agreement (J.A. 72) and that the lawsuit sought "the same kind of relief" (J.A. 74). Gulf did not, however, then or later, substantiate its allegations against opposing counsel by sworn affidavits, testimony, or other means.

In response, the plaintiffs' attorneys filed affidavits specifically denying Gulf's charges of misconduct[4] and asserting that communication with members of the proposed class was necessary to investigate and prepare the case and to inform affected employees of their statutory

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[4] Two of the attorneys for plaintiffs admitted attending the May 22 meeting at the invitation of their clients and answering questions from potential class members concerning the pending suit and the conciliation agreement (J.A. 115-116, 118). They denied advising potential class members to reject the settlement offer or representing that potential class members could recover twice as much back pay by proceeding with the suit (J.A. 116, 118).

rights (J.A. 111-120). Such communication, they asserted, "is of crucial importance at this time because of the offers being tendered to class members under the Conciliation Agreement entered into between the EEOC and Gulf Oil Company" (J.A. 114). Counsel also stated that they had not received and did not expect to receive compensation from the named plaintiffs or potential class members for their services (J.A. 113, 119). In an accompanying brief, plaintiffs claimed that the relief provided under the conciliation agreement was inadequate because the goals were too low, there was no firm commitment to timetables, and there was no provision for relief from unlawful testing (J.A. 108-109). In addition, plaintiffs noted that the back pay notices did not explain the types and extent of relief in the agreement or the method by which the back pay award was computed (J.A. 109). Based on all of the above, the plaintiffs challenged the constitutionality of the temporary restraining order and the district court's authority under Rule 23 to issue it (J.A. 83-91, 106-110).

3. Without making findings of fact, the district court on June 22 entered the modified order now before this Court (J.A. 124-127). That order, which was explicitly modeled on an order contained in the *Manual for Complex Litigation*, Pt. I, § 1.41 (1977 ed.) (hereinafter "*Manual*"),[5] generally forbade all parties and their attorneys from communicating with potential class members concerning the lawsuit without obtaining prior approval of the proposed communication from the court (J.A. 124). "The communications forbidden by th[e] order include, but are not limited to" (1) solicitation of legal representation, (2) solicitation of fees and expenses, (3) solicitation by defendants of "opt out" requests under Rule 23(b)(3), and (4) "communications * * * which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel,

[5] This section of the *Manual* is presently undergoing revision.

this Court, or the administration of justice" (J.A. 125). The order set forth several exceptions to these prohibitions, including communications between attorney and client, communications between attorney and prospective client when initiated by the prospective client, and communications in the "regular course of business" (*ibid.*). The order also excepted communications to which "any party or counsel for a party asserts a constitutional right," provided that within five days of any such communication the party or attorney files with the court a written copy or summary of it (*ibid.*).

Noting that "the private settlements of charges that the employer has violated Title VII is to be encouraged," the order also permitted Gulf to continue soliciting receipts and releases from employees covered by the conciliation agreement and extended the time for acceptance of the offer for an additional 45 days (J.A. 125-126). In addition, it instructed the clerk of the court to send a notice to the covered employees, the contents of which were set forth in the court's order, briefly describing the pending case and their choice of accepting Gulf's back pay offer or being considered at a later date for inclusion in the potential class (J.A. 126, 128-129).

On July 6, 1976, the plaintiffs moved for permission to distribute a notice to members of the putative class (J.A. 130), and asserted that the communication was constitutionally protected. The plaintiffs further asserted that both Gulf's May 1976 back pay offer and the notice sent by the clerk of the court failed to explain adequately the terms of the conciliation agreement (J.A. 131). The proposed notice alerted black employees to the existence of a lawsuit and urged them to "talk to a lawyer" before signing the release (J.A. 132-133). On August 10, two days after the 45 days for accepting Gulf's offer had expired (J.A. 157, 236), the court denied respondents' motion in a one-sentence order (J.A. 157). Respondents' appeal, consolidated with an appeal from the district court's later order granting summary judgment followed (see pages 2-3, *supra*).

SUMMARY OF ARGUMENT

At issue in this employment discrimination case is the validity of an order, issued by the district court shortly after the class action complaint was filed and prior to class certification, imposing broad restrictions on communications initiated by the named plaintiffs (respondents herein) or their attorneys (the NAACP Legal Defense Fund) with potential class members—present and past black employees at Gulf's plant in Port Arthur, Texas and unsuccessful black applicants. The order impaired respondents' ability to investigate their claims and to prepare for trial. In addition, it prevented respondents and their attorneys from providing information about the lawsuit to potential class members at a time when Gulf was tendering back pay to and seeking releases from them in connection with an independently-negotiated conciliation agreement believed by respondents to be inadequate.

Petitioners have failed to demonstrate that the order was an "appropriate" exercise of the district court's Rule 23(d) discretion to control the conduct of class actions. As petitioners concede, orders issued under this authority are subject to review for abuse of discretion. They also must be consistent with the purposes underlying Rule 23 and warranted by the particular facts of the case. The moving party thus must demonstrate by reference to specific facts that unsupervised communications by parties and their counsel with potential class members have materialized into actual abuses of the class action device or that abuses are imminently threatened.

The order here did not meet this standard; it was imposed without findings of fact and without any showing of actual or threatened abuse. Also, on this record it is at least arguable that the order worked against the interests of the absent potential class members.

Moreover, the order fails to satisfy constitutional standards under the First Amendment. It places a substantial burden on the First Amendment rights of re-

spondents and their attorneys to speak freely concerning the case and to associate for purposes of eliminating racial discrimination through litigation. Although the district court has a legitimate interest in protecting class members, preventing misrepresentation, and furthering the proper administration of justice in class action cases, those interests do not justify the particular means employed here—a blanket restriction on speech. As we have noted, the record contains no evidence, and the district court made no findings, that respondents or their attorneys had engaged or were likely to engage in improper or unethical conduct or that they posed a threat to the administration of justice. Nor was the order precisely tailored to restrict only those communications determined to pose a substantial threat to the legitimate interests purportedly being served. In any event, there are a number of readily available alternative means of serving those interests that do not involve such broad restrictions on speech.

ARGUMENT

THE DISTRICT COURT'S ORDER, WHICH IMPOSES BROAD RESTRICTIONS ON COMMUNICATIONS BETWEEN THE PARTIES OR THEIR ATTORNEYS AND POTENTIAL CLASS MEMBERS, IS NOT AN APPROPRIATE EXERCISE OF THE COURT'S POWER TO GOVERN CLASS ACTION PRACTICE AND FAILS TO SATISFY FIRST AMENDMENT STANDARDS

The private right of action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) is an essential means of enforcing that statute's guarantees against racial discrimination in employment. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). As this Court has said, the private Title VII plaintiff acts "not for himself alone but as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968).

Recognizing this strong national policy, the Court consistently has upheld the right of private parties to seek

complete relief in federal court not only for themselves, but for all persons similarly situated as well. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). As a practical matter, the exercise of that right hinges on the use of the class action device. Perhaps recognizing as much, the drafters of the 1966 amendments to Fed. R. Civ. P. 23 specifically contemplated that Subsection (b)(2) of the Rule would be particularly appropriate for litigating civil rights cases "where a party is charged with discriminating unlawfully against a class * * *." Notes of Advisory Comm. on Rules, 1966 Amendments to Fed. R. Civ. P. 23. And, as its drafters predicted, Rule 23(b)(2) repeatedly has been used for this purpose. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, *supra* (employment discrimination); *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978) (same), cert. denied, 442 U.S. 934 (1979); *Gore* v. *Turner*, 563 F.2d 159 (5th Cir. 1977) (housing); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir.), cert. denied, 385 U.S. 851 (1966) (voting rights); *Cypress* v. *Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967 (hospital services). See generally 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1776 (1972).

The order at issue in this case places a substantial burden on the exercise of the right under Title VII to litigate both individual and class claims of employment discrimination. Access to potential class members is necessary to develop the facts of a case and to prepare witnesses for trial. In addition, discovery from potential class members is frequently necessary to establish that the class is an appropriate one for certification. See, *e.g.*, *Pittman* v. *E.I. duPont de Nemours & Co., Inc.*, 552 F.2d 149 (5th Cir. 1977). By severely restricting the circumstances under which respondents and their attorneys can communicate with potential class members, the order thus impedes the development, presentation and determination of facts relevant to the Title VII claims at issue. The order also lessens the ability of respondents and their attorneys to encourage other Gulf employees

to participate in the suit. Contrary to petitioners' suggestion that such activity is an "abuse[]" of Rule 23 (Pet. Br. 22-23), we believe that it effectuates the primary policy underlying the Rule of resolving similar claims in a single lawsuit. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550 (1974).[6] Indeed, Rule 23 has been interpreted as authorizing (rather than forbidding) individuals to encourage common participation in a Title VII suit. *Coles* v. *Marsh*, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972).

In light of these considerations, it is our view that the district court's order was not an approriate exercise of the court's power under Rule 23 to govern class action practice and, indeed, exceeded established constitutional limitations.

A. The District Court's Order is Not an "Appropriate" One under Rule 23(d) Absent a Showing of Actual or Threatened Misconduct by Respondents or Their Attorneys

We recognize that the majority below premised its decision on the First Amendment and that the sole question as to which this Court granted certiorari involves the constitutionality vel non of the district court's order. As we explain below (see Part B, *infra*), in our view that order imposes an unconstitutional restraint on speech. However, in light of the existence of a dispositive non-constitutional ground for affirmance (see, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), we first address the order's invalidity under Fed. R. Civ. P. 23.

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[6] As the Court observed in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339 (1980) "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Petitioners contend that the district court's authority[7] to issue an order restricting communications flows from Rule 23(d), which provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given * * * of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons * * *; (5) dealing with similar procedural matters. * * *.

As its drafters observed, Subsection (d) is designed to facilitate "the fair and efficient conduct of" class actions.[8] Notes of the Advisory Comm., 1966 Amendment to

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[7] We note that an additional source of authority is provided by Rule 83, which permits district courts to adopt local rules consistent with the federal rules and, where no rule applies, to regulate practice in any manner consistent with the federal rules. See *Coles* v. *Marsh*, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977). The district court also has inherent power to control the conduct of litigants and attorneys who appear before it. *Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980). The exercise of these powers, however, must be consistent with the purposes underlying Rule 23 and is subject to reversal on appeal for abuse of discretion. *Coles* v. *Marsh, supra.* Of course, the *Manual* merely provides guidelines for use in complex and multi-district federal cases and cannot itself confer additional power on the district court.

[8] Among the orders commonly issued under Rule 23(d) are orders consolidating cases, designating general counsel, creating subclasses, establishing timetables for discovery and trial, and fixing cut-off dates for intervention. See, *e.g.*, *In re Air Crash Disaster*

Rule 23. To that end, Subdivision (d)(3) "reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, * * * and recognizes that the imposition of conditions on interven[ing class members] may be required for the proper and efficient conduct of the action." Notes of the Advisory Comm., *supra.*

Thus the district court's authority under Rule 23(d) is broad and doubtless includes the power to protect absent or potential class members. However, that authority is not unlimited. As petitioners concede (Pet. Br. 16, 21 n.15), orders issued under Rule 23(d) are subject to appellate review for abuse of discretion. See, *e.g.*, *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978) (reversing an order requiring defendant to bear costs of identifying members of plaintiff class). Moreover, such orders may not impose unwarranted substantive conditions on the maintenance of class action suits. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). To be "appropriate" under Rule 23(d), orders must be consistent with the purposes underlying Rule 23 and justified by the particular facts of the case.

In determining whether an order is "appropriate," the district court should of course consider the interests of absent class members. See *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977) (appellate review of Rule 23(d) orders is necessary "to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision"). But the interests of absent class members is only one of a cluster of interests that must be weighed by the court in controlling the conduct of class actions. In *Deposit Guaranty National Bank* v. *Roper*, *supra*, 445 U.S. at 331, this Court recently identified at least four such interests:

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at *Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1012 n.8 (5th Cir. 1977) (appointing lead counsel); *City of Philadelphia* v. *Morton Salt Co.*, 385 F.2d 122 (3d Cir. 1967), cert. denied, 390 U.S. 995 (1968) (establishing cut-off date for closing of class); see generally 7A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1791-1796 (1972).

> First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims. A separate consideration, distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class. Two other interests are implicated: the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

Because the nature and strength of these interests will vary from case to case, the district court must make a case-by-case determination of what is "appropriate" for the "fair and efficient conduct of the action."

As we have shown (pages 10-11, *supra*), an order restricting communications with potential class members impairs the named plaintiffs' ability to discover and litigate individual and class claims and, more broadly, to represent the interests of the class. In addition, such an order may well harm potential class members directly by restricting their opportunity to obtain information about their legal rights and remedies and to pursue, if they choose, a common claim. Given these major drawbacks, the mere generalized potential for abuse of the class action mechanism is not sufficient, in our view, to justify as appropriate an order broadly restricting communications with the putative class. As the court of appeals implicitly recognized (J.A. 262-263), the class action device is not so inherently conducive to misuse as to justify an assumption in every case that misconduct is likely to occur. Such an assumption is all the more unwarranted where, as here, respondents are represented by a public interest law firm that has "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," and is engaged in "a different matter from

the use of the * * * legal process for purely private gain." *NAACP* v. *Button*, *supra*, 371 U.S. at 422, 443. The *Manual* itself recognizes that abuses of the class action device are exceptions rather than the rule (*Manual*, *supra*, § 1.41 at 31).[9]

A request for an order restricting communications with potential class members is not essentially different from a request for a protective order under Fed. R. Civ. P. 26(c) or for a preliminary injunction under Rule 52(a) to achieve the same end. See *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). Just as a protective order can be en-

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[9] As illustrations of "abuses" of the class action procedure, the *Manual* cites seven cases, four of which involve conduct that would not be prevented by the *Manual's* proposed order. *Ace Heating and Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971) (defendants negotiated settlement of class action with second set of plaintiffs' attorneys after first set declined offer); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970) (motion to withdraw class allegations to effectuate individual settlement); *Rothman* v. *Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) (same); *Wainwright* v. *Kraftco Corp.*, 53 F.R.D. 78 (N.D Ga. 1971) (joint motion to approve settlement). Two of the remaining three cases involve conduct bearing little resemblance to the activities here. *Korn* v. *Franchard Corp.*, 1971 Sec. L. Rep. ¶ 92,845 (S.D.N.Y. 1971), rev'd, 456 F.2d 1206 (2d Cir. 1972) (under a pseudonym, class attorney sought unauthorized discovery in unrelated case); *Northern Acceptance Trust 1065* v. *Amfac, Inc.*, 51 F.R.D. 487, 491 (D. Hawaii 1971) (defendants solicited affidavits from plaintiff class denying that plaintiffs represented affiants). Only *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), appeal dismissed, No. 72-1065 (5th Cir. June 23, 1972), involved solicitation by a class member (who also served as class counsel) of others willing to have a class action initiated in their names. This case predates recent decisions invalidating traditional prohibitions on lawyer advertising and solicitation (see, *e.g.*, *In re Primus*, *supra*; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)) and apparently involved solicitation for financial gain. Compare *Ohio* v. *Richter Concrete Corp.*, 69 F.R.D. 604, 606-607 (S.D. Ohio 1975). Significantly, the Court's reference in *Deposit Guaranty National Bank* v. *Roper*, *supra*, 445 U.S. at 339, to the "potential for misuse of the class action mechanism" concerned the financial incentive that class actions offer to the private bar, and not the nonprofit activities of organizations such as the Legal Defense Fund. See note 12, *infra*.

tered only upon a finding of "good cause," *In re Halkin, supra,* and a preliminary injunction requires, *inter alia,* a factual showing that the need for the order outweighs its disadvantages (see, *e.g., Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980)), so too an order restricting communications under Rule 23(d) should be premised on a finding that the need for it outweighs the advantages of unrestrained, or less restrained, communications. To meet its burden of proof, the moving party should be required to make a particularized showing that unsupervised communications with potential class members have materialized into actual abuses of the class action device or that such abuses are imminently threatened (J.A. 273). In addition, "the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties." *Coles* v. *Marsh, supra,* 560 F.2d at 189; *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975), cert. denied, 423 U.S. 832 (1975); see also *In re Halkin, supra.*

In issuing its order restricting communications in this case, the district court made no factual findings.[10] Rather

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[10] Since Rule 23(d) orders are reviewable (*Oppenheimer Fund, Inc.* v. *Sanders, supra*), they must be based on findings of fact. The reasons for this requirement were summarized by the First Circuit in *Sargeant* v. *Sharp,* 579 F.2d 645, 647 (1978) (citations omitted):

> [I]ssuance of an order * * * without an adequate statement of the reasons for the order does not meet minimum fairness and regularity * * *. Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

This Court has repeatedly emphasized that a district court, in exercising its equitable powers, must articulate specific findings in support of its conclusions. See, *e.g., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 419 (1977). The concurring judges in the court of appeals correctly concluded that this principle applies

than weighing the competing interests that would be benefited and burdened by such an order, the court simply imposed a blanket rule in accordance with the *Manual's* recommendation that that be done in every class action. Petitioners nevertheless contend that "the district court acted only after compiling a complete record showing the class action process was threatened by abuse" (Pet. Br. 22), and that the order was therefore appropriate under Rule 23. As evidence of a threatened abuse, they cite two affidavits in which respondents' attorneys admitted attending at respondents' invitation a meeting of potential class members shortly after suit was filed. The attorneys discussed the issues in the case, answered questions from the audience, and explained the administrative and legal problems inherent in the litigation (J.A. 115-116, 118). Apparently implying that these activities amounted to improper solicitation, petitioners conclude: "Thus, the plaintiffs created and their attorneys participated in the type of activity which the *Manual's* recommended order was designed to control" (Pet. Br. 23).[11]

"to any court order that is based on the court's assessment of conflicting evidence or policy considerations," including orders under Rule 23(d) (J.A. 272). Accord, *Coles* v. *Marsh*, *supra*. The district court's failure to articulate findings of fact in support of its order provides an additional basis for concluding that the order was not an "appropriate" exercise of discretion under Rule 23(d).

[11] Petitioners also represent as fact mere allegations made in their district court briefs (Pet. Br. 23). In originally seeking an order restricting communications, petitioners' memorandum of law stated: "it is reported to Gulf that [a Legal Defense Fund attorney] advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them under the conciliation agreement by prosecuting the present lawsuit" (J.A. 23-24). Petitioners made similar unsworn allegations in a subsequently filed memorandum (J.A. 47). The two Legal Defense Fund attorneys who were present at the meeting filed affidavits specifically denying these unsworn charges (J.A. 115-116, 118), and petitioners never submitted substantiating affidavits or testimony. At the "hearing" held prior to entry of the order (see Pet. Br. 22 n.16), the district court heard oral argument but did not receive evidence. Both the

We do not agree that providing information about the lawsuit to potential class members and answering questions concerning their rights somehow constitute "abuses" that should be discouraged. To the contrary, in our view such activity is constitutionally protected and, in addition, is consistent with the purposes underlying Rule 23. See pages 10-11, 14, *supra*, and pages 26-27, *infra*.[12]

Petitioners also argue that the order was appropriate in this case because it was issued in the midst of an ongoing conciliation process when potential class members were particularly vulnerable to misrepresentations and undue influence (Pet. Br. 22-26). However, even if the underlying premise is true, and even if that circumstance might justify a more narrowly drawn protective order than was involved here,[13] it is a consideration that must

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three-judge panel of the court of appeals and the en banc court correctly concluded that on this record the above charges were entitled to no weight (J.A. 195, 241).

[12] Under the Code of Professional Responsibility, the activity involved here—attending a meeting at the invitation of named plaintiffs, providing information to potential class members and answering their questions—does not constitute improper solicitation of representation, even when engaged in by private attorneys. DR 2-104(A)(2), (A)(5), ABA Code of Professional Responsibility (1978). Canon 2 in fact encourages members of the bar "to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available." EC 2-1, *supra*. Moreover, the Code's limitations on solicitation specifically exempt non-profit organizations such as the Legal Defense Fund. DR 2-104(A)(3), *supra*. Also compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), with *In re Primus*, *supra*; *NAACP* v. *Button*, *supra*. Since respondents' attorneys do not expect to receive compensation from respondents or from the potential class for their services even on a contingent basis (J.A. 113, 119), this case does not involve solicitation of fees or expenses.

[13] The cases cited by petitioners recommending court supervision of individual settlement offers made while a class action is pending were concerned with the possibility that the defendant, in soliciting individual settlements with plaintiff class members, would misrepresent the strength of the class claims and that as a result "the class action vehicle would be eviscerated." *American*

be balanced against the fact that individual victims of employment discrimination have an absolute right under Title VII to reject the terms of a conciliation agreement or consent decree negotiated between the government and their employer. See *Alexander* v. *Gardner-Denver Co., supra; United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 848 n.26 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Indeed, private plaintiffs can proceed to trial even after such a consent decree has been approved by the court as fair, lawful and reasonable. *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 333 (1980); *United States* v. *City of Jackson*, 519 F.2d 1147 (5th Cir. 1975). Moreover, releases given by actual or potential class members in conjunction with an offer of settlement are invalid unless they are the product of a knowing and voluntary waiver of the right to litigate or seek further redress. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 52 n.15.[14]

Finance System, Inc. v. *Harlow*, 65 F.R.D. 572, 576 (D. Md. 1974); see also *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1130-1140 (7th Cir.), cert. denied, 444 U.S. 870 (1979); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461, 464 (N.D. Ind. 1976).

[14] A waiver of remedial rights guaranteed by federal civil rights laws "is not lightly to be inferred." *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1172 (5th Cir.), cert. denied, 429 U.S. 861 (1976). Before it may be concluded that an employee has elected to waive the right to present a claim of discrimination in a judicial forum, it must be shown that at the time of executing the release the employee was given a full explanation of the consideration for the waiver and that he or she fully understood the extent of the bargain. *Cox* v. *Allied Chemical Corp.*, 538 F.2d 1094, 1098 n.5 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978). That explanation must cover not only the monetary award and other benefits to be received but also the remedial rights to be given up. *Watkins* v. *Scott Paper Co., supra.* In addition, the employee must be given "ample opportunity to reflect and seek advice" concerning the choice. *Rodgers* v. *United States Steel Corp.*, 70 F.R.D. 639, 647 (W.D. Pa. 1976) (on remand). Releases obtained in violation of these requirements are subject to collateral attack. See, *e.g.*, *Winfield* v. *St. Joe Paper Co.*, 20 F.E.P. Cas. 1103 (N.D. Fla. 1979).

In this case, the potential members of the plaintiff class were faced with a choice between accepting Gulf's back pay offer and being considered for inclusion in respondents' class action. The broad order imposed here prevented respondents and their attorneys from providing information about the suit to class members despite respondents' contention that some of the issues addressed by the suit—such as the validity of employment tests—were not covered by the conciliation agreement and that the benefits provided for in the agreement were inadequate. Therefore, rather than protecting potential class members, the district court's order tended to deprive them of their most likely source of information and legal advice at the very time they were being required to elect between alternative modes of redress. See *Rodgers* v. *United States Steel Corp.*, *supra*. As the court of appeals correctly recognized, "[t]he choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice" (J.A. 266).[15]

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[15] Prior to the May 22 meeting attended by respondents' counsel, the only information potential class members received concerning their options was Gulf's letter offering back pay and soliciting releases. This letter was insufficient to enable them to make an informed choice between accepting Gulf's back pay offer and pursuing their private right of action. The letter did not include a copy of either the conciliation agreement or the Commissioner's charge that triggered the settlement discussions. Nor did it describe any provisions of the agreement, such as the affirmative action goals, other than the back pay offer. Its description of the back pay offer failed to describe the formula used to compute the amount of each employee's monetary award, and did not even explain the general basis for the award. Rather than encouraging the employees to reflect on and seek advice concerning the offer, the notice instructed the employees not to discuss the offer with anyone. It urged employees to sign a general release and at the same time informed them that they retained full rights to administrative and legal processes (see Appendix, *infra*).

Thus, petitioners failed to show, and the district court did not find, that either respondents or their counsel acted inappropriately or that the specific circumstances of this case justified an order broadly restricting communications with the putative class. The order therefore was not "appropriate" under Fed. R. Civ. P. 23(d).

B. The District Court's Order Imposes an Unconstitutional Restraint On Speech

1. We recognize that a district court, in furtherance of the fair administration of justice, has broad power to control the course of litigation and the conduct of litigants and attorneys who appear before it (*Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980)) and to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences" (*Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966). Indeed, in its day-to-day activities, a district court frequently restricts the speech and association of participants in the proceedings, as well as the speech of observers, to ensure that the proceedings are conducted efficiently, with proper decorum and without outside influence. While most such restrictions simply regulate the time, place or manner of speech in the courtroom (cf. *Consolidated Edison Co.* v. *Public Service Commission*, No. 79-134 (June 20, 1980)), in appropriate circumstances such restrictions may extend beyond in-court speech to extrajudicial discussions of or publicity on pending litigation. For example, a district court may properly instruct the jury not to discuss the pending case with non-jurors until a verdict had been reached,[16] or may

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[16] In contrast to the order at issue here, such an instruction meets First Amendment standards (see page 26, *infra*). It is narrowly tailored to prohibit precisely those communications which pose a danger of outside influence to the jury's deliberations. In addition, its meaning is clear and the compelling interest being served—protecting the integrity of the trial process—is present in every case.

prohibit counsel from disclosing matters revealed in camera.[17] In appropriate settings, the dangers of solicitation for private gain or of misrepresentation could justify a narrowly tailored regulation of speech. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978). And a court may conclude that the danger of misrepresentation or overreaching in a particular case justifies judicial examination of an offer by the defendant to settle with individual members of the plaintiff class or, in Rule 23(b)(3) cases, of attempts to solicit opt-out requests. *In re General Motors Corp. Engine Litigation*, 594 F.2d 1106, 1139-1140 (7th Cir. 1979). Nevertheless, court-imposed restrictions on parties and attorneys are disfavored outside of these narrow contexts[18] and must be carefully scrutinized to ensure that they comply with constitutional requirements.

In the present case, the court of appeals correctly concluded that the order at issue operates as a classic prior restraint on speech. Typically, a prior restraint places specified communications under the personal censorship of a judge or administrative authority. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *In re Halkin*, *supra*, 598 F.2d at 184 n.15; *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 278 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).[19] Its purpose is to suppress un-

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[17] Attorneys, of course, "have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

[18] In civil cases, where the competing interest of the defendant's Sixth Amendment right to a fair trial is not present, court orders or statutes prohibiting comments on pending cases generally have been struck down, both when directed toward the press (see, *e.g. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Wood* v. *Georgia*, 370 U.S. 375 (1962)), and when imposed on parties and their attorneys (see, *e.g.*, *In re Halkin*, *supra*; *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers* v. *Bauer*, *supra*; *CBS, Inc.* v. *Young*, 522 F.2d 234 (6th Cir. 1975)).

[19] A judicial restraint on speech generally carries with it a greater certainty of punishment than a criminal statute or other legislative prohibition on speech. "While a statute poses only a

desirable speech before it takes place. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418-419 (1971). To avoid violating a directive imposing such a restraint, the speaker must seek clearance in advance and bears the burden of persuading the tribunal that the speech is unobjectionable.[20]

The district court's order in this Court was a prophylactic measure, the purpose of which was to suppress speech before it took place rather than to punish past misconduct. As the court of appeals observed, the order had its intended effect (J.A. 248-249; footnote omitted):

> It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, questioned by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue despite the contentions of

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'mute, impersonal threat,' a judicial order singles out particular individuals, increasing both the likelihood of punishment if the order is violated and the probability that protected speech will be chilled regardless of the defenses which may ultimately be available in subsequent proceedings." *In re Halkin*, *supra*, 598 F.2d at 184 n.15; *Rodgers* v. *United States Steel Corp.*, *supra*, 508 F.2d at 161.

[20] In contempt proceedings for violating a prior restraint, the penalty is imposed quickly and often is not accompanied by all of the procedural safeguards associated with criminal proceedings. As the Court stated in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976) (footnotes omitted):

> A criminal penalty * * * is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

> plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

Moreover, as petitioners concede (Pet. Br. 33 n.37), the order was to be enforced through the court's criminal contempt power rather than through the criminal justice system. And like prior restraints on public comment on pending or anticipated trials (see, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, *supra*; *CBS* v. *Young*, 522 F.2d 234, 239 (6th Cir. 1975)), the order placed proposed communications under the personal censorship of the district court.

Petitioners construe the order's express exception for communications to which a party or counsel "asserts a constitutional right" (J.A. 125) to permit the constitutionality of a communication, or the communicator's good faith belief in its constitutionality, to be asserted as a defense in contempt proceedings, and urge that so long as the five-day filing requirement is met, the order "freely allows" litigants and attorneys to exercise their First Amendment rights (Pet. Br. 17, 32-33). But the protection purportedly offered by the exception is illusory. The filing requirement is so onerous and the "good faith" defense so fraught with uncertainty that the order nevertheless operates as a prior restraint on speech.

The filing requirement itself chills expression by imposing a substantial burden on respondents and their attorneys. It requires that a copy of every written communication and a "complete summary" of every oral communication between respondents or their attorneys and a potential class member be filed with the court. Respondents could well find compliance with this requirement impossible since it presupposes that they know what is constitutionally protected and that they possess the means to comply.

The exception has an additional serious chilling effect because it makes guilt or innocence on criminal contempt charges depend on the assertion of "good faith." As a practical matter, neither a party nor an attorney can safely take refuge in the exception since there is no certainty that, or even predictability regarding whether and when, the good faith defense will be credited. It may not be as easy to establish "good faith" as petitioners appear to assume. For example, where, as here, the court denies the plaintiff's request for permission to distribute to prospective class members a notice they correctly believe to be constitutionally protected, it is by no means clear that they could thereafter proceed to distribute a similar notice in good faith. Significantly, the exception offered little comfort to the respondents' attorneys in this case, who already had been accused by petitioners of misconduct. As the court of appeals concluded, "[m]ost attorneys, faced with an order like the one before us, would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members" (J.A. 252).

While a prior restraint on expression is not unconstitutional per se, it is subject to a "heavy presumption" against its unconstitutionality, and the burden of justification is heavier than that imposed on subsequent restrictions on speech. *Southeastern Promotions, Ltd.* v. *Conrad, supra; New York Times* v. *United States*, 403 U.S. 713 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The greater protection against prior restraints reflects the established First Amendment principle that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad, supra*, 420 U.S. at 559 (emphasis added). Petitioners have failed to overcome this "heavy presumption" in seeking to justify the broad restraint imposed in this case.[21]

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[21] There obviously has been no showing that the expression sought to be restrained " 'surely [will] result in direct, immediate

2. Indeed, whether the district court's order is viewed as a prior or subsequent restraint on speech, petitioners have not demonstrated that it satisfies constitutional standards. Attempts to punish or restrict speech after the event, while not presumptively invalid, must nevertheless withstand exacting scrutiny, both of the interests asserted to justify the restriction and the means used to achieve the asserted goals. See, *e.g.*, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102, 105 (1979). Thus, the party seeking to uphold the subsequent restraint must demonstrate that it serves a "state interest of the highest form" (*ibid.*) and one that is "compelling" (*First National Bank of Boston* v. *Belloti*, 435 U.S. 765, 786 (1978)). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). See *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Smith* v. *Daily Mail Publishing Co.*, *supra*. In addition, the restrictions' meaning must be clear because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (citations and footnotes omitted).

Relying on the *Manual*, *supra*, petitioners attempt to justify the district court's order as an appropriate means of preventing solicitation and misrepresentation, of protecting absent class members from other "abuses" of the class action procedure and of furthering the proper administration of justice (Pet. Br. 27, 29, 35). However, under *NAACP* v. *Button*, *supra*, and its progeny,[22] petitioners have no

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and irreparable damage.'" *International Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 833 (5th Cir. 1979), quoting *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 730 (Stewart, J., joined by White, J., concurring).

[22] *In re Primus*, *supra*; *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen* v. *Va. State Bar*, 377 U.S. 1 (1964).

legitimate interest in seeking to prohibit solicitation of representation or participation in the suit by respondents or their attorneys. As these cases recognize, respondents and their attorneys have a constitutional right to associate and speak with Gulf's employees in an effort to eliminate racial discrimination and to use litigation as a vehicle for achieving that end. This right encompasses solicitation of other persons to bring and participate in civil rights suits, at least in the absence of evidence not present here of overreaching, misrepresentation, or other misconduct. *In re Primus, supra,* 436 U.S. at 432.

With respect to the other interests asserted, we recognize that First Amendment protections are not unlimited, and that the district court has a legitimate interest in preventing misrepresentation, undue influence and other substantive evils tending to impede the fair administration of justice or the proper conduct of class actions. See, *e.g., Roadway Express, Inc.* v. *Piper, supra; In re Primus, supra,* 436 U.S. at 426. "[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government." *Wood* v. *Georgia, supra,* 370 U.S. 375, 388 (1962).

Nevertheless, these legitimate interests do not justify the particular means employed here—a blanket restriction on out-of-court speech imposed in the absence of any showing of a need to protect such interests in this case. As we have noted (see pages 4-6, 17, *supra*), the record contains no evidence, and the district court did not find, that respondents or their attorneys had engaged in or were likely to engage in misrepresentation, overreaching or other improper conduct. Nor is there evidence that they otherwise posed a threat to the fair administration of justice.

The district court's order thus fails to satisfy a fundamental First Amendment principle: "[r]ights of political expression and association may not be abridged because of * * * interests asserted by appellate counsel without substantial support in the record or findings of the * * *

court." *In re Primus, supra,* 436 U.S. at 434 n.27 (citations omitted). Accord, *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 789; *Wood* v. *Georgia, supra,* 370 U.S. at 388; *Bridges* v. *California,* 314 U.S. 252, 271 (1941).[23] As *In re Primus* demonstrates, this principle specifically applies to prophylactic rules intended to prevent attorney misconduct such as "undue influence, overreaching, misrepresentation, invasion of privacy, [and] conflict of interest." 436 U.S. at 432. To justify a restriction on protected speech in this context, there must be a showing not that potential danger exists, but that the activity "in fact involved th[is] type of misconduct." *Id.* at 434.

Even if there had been a showing of actual or potential misconduct in this case, the order is unconstitutionally overbroad because it is not precisely tailored to restrict only those communications determined to pose a substantial threat to the legitimate interests purportedly being served.[24] This Court has repeatedly stated that

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[23] The Court stated in *Bridges* (*ibid.*):

> [W]e cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials * * *. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

[24] The constitutional infirmity of the order would not be cured if the four types of speech specified therein were exclusive rather than illustrative (see pages 6-7, *supra*). While a court may have a legitimate interest in prohibiting improper solicitation of representation, of funds and of opt-out requests where there is a danger of improper conduct, there is no justification for doing so here. As we have shown, efforts by respondents or their attorneys to solicit representation are constitutionally protected, and the attorneys have not sought nor do they expect to receive compensation for their services from their clients or the potential class (J.A. 113, 119). Therefore, the prohibitions in subparagraphs 2(a) and (b) of the order may not be constitutionally imposed in

"[b]road propylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *." *NAACP* v. *Button*, *supra*, 371 U.S. at 438 (citations omitted). That is so because "First Amendment freedoms need breathing space to survive * * *." *Id.* at 433; accord, *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*, 444 U.S. at 637; *In re Primus*, *supra*, 436 U.S. at 426. There is no reason to depart from these established principles in this case. As we have noted (pages 14-15 & note 9, *supra*), the class action procedure is not so inherently conducive to abuse as to justify an assumption that misconduct will occur in every case, particularly in a Title VII action such as this where respondents are represented by a non-profit organization with recognized expertise in civil rights litigation. Rule 23 provides a mechanism for balancing in each case the interests in unsupervised communications against the need to protect class members from a particular abuse.

The protection afforded speech and association in this context by the First Amendment would obviously be illusory if every conceivable threat of misrepresentation or other danger to potential class members, however remote or speculative, were sufficient to justify a blanket restriction on speech. As we have noted (pages 21-22, *supra*), a district court in the conduct of trials places significant restraints on the free expression and as-

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this case. The prohibition against solicitation of opt-out requests by defendants in subparagraph 2(c) by its terms is limited to class actions brought under Rule 23(b)(3). Since this case was brought under Rule 23(b)(2), subparagraph (2)(c) similarly does not apply. Finally, subparagraph (2)(d) prohibits all communications "which may tend to misrepresent * * * the class action" and "which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice" (J.A. 125). The court of appeals was correct in concluding that this provision merely compounds the unconstitutionality of the order because of its vagueness and overbreadth (J.A. 256 n.26). See also *Hirschkop* v. *Snead*, *supra*; *Chicago Council of Lawyers* v. *Bauer*, *supra*, 522 F.2d at 249; *Zarate* v. *Younglove*, 86 F.R.D. 80, 101 (C.D. Cal. 1980).

sociation of litigants, attorneys, and other participants in the proceedings. But "[w]hatever may be the limits of a court's powers in this respect, it seems that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Rodgers* v. *United States Steel Corp., supra,* 508 F.2d at 163. Even where the competing interest is the accused's constitutional right to a fair trial, restrictions on First Amendment rights cannot be imposed "absent an overriding interest articulated in findings." *Richmond Newspapers Inc.* v. *Virginia,* No. 79-243 (July 2, 1980). If the demands of the Sixth Amendment do not lessen the burden on those who seek to justify a prior restraint on comments on pending litigation, certainly the interests of a civil litigant cannot do so. See *Hirschkop* v. *Snead, supra,* 594 F.2d at 373.

The fact that a back pay offer was pending in this case does not change this principle. To be sure, the speech of respondents and their attorneys may have influenced potential class members in exercising their choice to accept Gulf's settlement offer or to pursue their private right of action. But even in the commercial speech area, the First Amendment rejects the "highly paternalistic" approach of restrictions on what individuals may hear. *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 790-792; *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 770 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 97 (1977). As the court stated in *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 791-792 (citations omitted):

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a

danger contemplated by the Framers of the First Amendment.[25]

In any event, there are a number of alternative means of serving the interests asserted by petitioners that do not involve such broad restrictions on speech. If, parties or attorneys, in communicating with potential class members, misrepresent the status, purposes or effect of the class action (J.A. 125), remedial notice can be sent to the affected group. See, *e.g.*, *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 929, 932 (7th Cir. 1972).[26] Pur-

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[25] Although petitioners argue that the order was "evenhanded" because it prohibited communications by *any* party or their attorneys with prospective class members, they also concede (Pet. Br. 32 n.34) that the order allowed Gulf to resume the conciliation process under the court's supervision. While we agree that a court, upon a specific showing of need, may take neutral steps to protect potential class members from misrepresentation in the settlement context, the order in this case was neither justified by the record nor neutral in effect. By giving black employees a second opportunity to accept Gulf's back pay offer and by referring the employees to Gulf's notice of May 1, which did not present the employees' choice in objective terms (see Appendix, *infra;* note 15, *supra*), the order in practice gave preferential treatment to the speech-related activities of petitioners. Such selective regulation of the content of speech violates the First and Fifth Amendments. See, *e.g.*, *Carey* v. *Brown*, No. 79-703 (June 20, 1980); *First National Bank of Boston* v. *Bellotti, supra; Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972). As the Court stated in *First National Bank of Boston* v. *Bellotti, supra*, 435 U.S. at 785 (footnote omitted):

> Especially where, as here, the * * * suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

[26] In class actions brought under Rule 23(b)(3), parties who opt out of the class in reliance on misrepresentations by defendants can be allowed to rejoin. See, *e.g.*, *Zarate* v. *Younglove, supra*, 86 F.R.D. at 90 n.13. In Rule 23(b)(2) cases such as this, potential class members who accept a settlement offer in reliance on incomplete or inaccurate information from defendants can be treated as a separate subclass of plaintiffs. See, *e.g.*, *Winfield* v. *St. Joe Paper Co., supra.*

poseful attorney misconduct can be handled by disciplinary proceedings, the traditional means of policing professional ethics. Improper conduct by parties or attorneys may also be discouraged, where appropriate, by denying or revoking class certification (see, *e.g.*, *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), appeal dismissed, No. 72-1605 (5th Cir. June 23, 1972); *Taub* v. *Glickman*, 14 Fed. Rules Serv. 2d 847 (S.D.N.Y. 1970)) or by substituting class counsel (see, *e.g.*, *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972); *Flaska* v. *Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928 (1968)). Misuse of the discovery process can be prevented by obtaining, "for good cause shown," a protective order under Fed. R. Civ. P. 26(c) (see, *e.g.*, *IBM* v. *Edelstein*, 526 F.2d 37, 41 n.2 (2d Cir. 1975)) or by invoking the discovery sanctions of Rule 37 (see, *e.g.*, *Roadway Express, Inc.* v. *Piper*, *supra*). Unreasonable or illegal cost-splitting or contingent fee arrangements can be policed in part by refusing to enforce them. Finally, in the rare case in which they are warranted, the court has the inherent power to levy such sanctions as dismissal of the suit or assessment of attorneys' fees directly against opposing counsel (*ibid.*).

It is true that most of these alternatives remedy or punish misconduct after it has occurred rather than prevent it from occurring in the first instance (but see Fed. R. Civ. P. 26(c)). But as we noted above (see page 25, *supra*), implicit in the First Amendment is the judgment that it is preferable to punish the few who actually abuse their privileges than to suppress protected speech beforehand: "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 559.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1981

APPENDIX

May 1, 1976

Dear Mr. Hayes:

In line with its continuing policy of providing equal opportunity to all employees and annuitants, Gulf has recently entered into an agreement with the United States Equal Employment Opportunity Commission and the U. S. Department of the Interior. As part of the written agreement, Gulf has identified certain employees and annuitants to whom back pay will be offered in settlement of past discrimination claims, even though Gulf does not admit to having discriminated against anyone. You are a member of this group of employees and annuitants, and should you accept the terms of this offer, you will immediately receive by certified mail $1,163.34 less legal deductions for social security, if applicable, and income tax. The amount of your back pay was figured according to your plant seniority date, and very probably will not be the same as that of anyone else presented an offer under the agreement.

Because this offer is personal in nature, Gulf asks that you not discuss it with others. Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants. Even though both you and Gulf may feel that you have not been discriminated against in any way by Gulf, the money is available to you upon acceptance. To help you make a decision, Gulf wants you to understand that the only condition for accepting back pay is that you sign a written statement releasing Gulf from any possible claims of employment discrimination occurring before the date of your release, including any future effects of alleged past practices. Of course, in all other ways you will retain full rights to administrative and legal processes.

Enclosed you will find a written "Receipt and General Release". You may immediately receive your back pay check by completing all questions on the Receipt and General Release, signing before a Notary Public and

returning it in the self-addressed envelope provided. Services of a Notary Public will be provided at no charge by calling 983-3301, ext. 484 or 467. Once you have returned the signed Receipt and General Release, you should receive your check by mail within 7 to 10 days.

If you feel that you cannot respond because you do not understand Gulf's offer, you may contact Mr. C. B. Draper at 983-3301, ext. 467, during normal business hours, to arrange an interview with a government representative who will answer your questions.

Gulf Oil Co.-U. S.

By: /s/ B. F. Short
B. F. SHORT

Equal Employment Opportunity
Commission

By: /s/ James R. Anderson
JAMES R. ANDERSON

Enclosure

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